

19th day of February, 2002

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-55/51132

PRELIMINARY RECITALS

Pursuant to a petition filed November 8, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the St. Croix County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on January 22, 2002, at New Richmond, Wisconsin.

The issue for determination is how much, if anything, is the petitioner's spouse entitled to as an allocation in order to meet her basic needs under the spousal impoverishment provisions of the medical assistance program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Department of Health and Family Services

Division of Health Care Financing

1 West Wilson Street, Room 250

P.O. Box 309

Madison, WI 53707-0309

By: Heather Gensen, ESS

St. Croix County Dept Of Human Services

1445 N. Fourth Street

New Richmond, WI 54017-1063

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien

Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of a nursing home in St. Croix County.
2. The petitioner is 58 years old.
3. The petitioner's spouse lives in the community.
4. The petitioner's unearned income is \$764 per month.
5. The petitioner's spouse's shelter costs are less than \$580 per month.
6. The petitioner's spouse submitted a budget that included \$25 for the petitioner's clothing, \$50 for his incidentals, \$10.10 for his cable television, and \$10 for his entertainment. *Exhibit 1.*

7. The budget submitted by the petitioner's wife shows the following monthly expenses for herself:

A.	Real Estate Taxes	\$77.65
B.	Real Property Insurance	\$38.23
C.	Maintenance	\$100
D.	Food & Household Supplies	\$400
E.	Utilities	\$234
F.	Telephone	\$100
G.	Clothing	\$75
H.	Medical & Drug not covered by insurance	\$50
I.	Entertainment	\$20
J.	Incidentals (beauty, cigarettes, newspapers)	\$100
K.	Auto expenses (includes petitioner's expenses)	\$581
L.	Auto payments	\$729.04
M.	Credit Card payments	\$66
8. The petitioner and his spouse own a 1998 Windstar. Payments are \$729.04 per month. It was made handicap-accessible for the petitioner. When it was purchased the petitioner expected to be able to live at home rather than in a nursing home.
9. The petitioner does not require more than \$125 for vehicle maintenance.
10. The petitioner and his wife are also responsible for \$199.95 in overdue medical bills.
11. The petitioner's wife has a business. Her income was \$2,180.40 in September 2001 and \$1,702.40 in October and November 2001.
12. The petitioner applied for institutional medical assistance on September 18, 2001 and requested that he receive benefits retroactive to August 2001.

DISCUSSION

The petitioner lives in a nursing home at the relatively young age of 58. His spouse, who is only 51, and who as one might guess, was not financially prepared for her husband's unexpected medical troubles, finds it difficult to live within her income. Compounding her trouble is that medical assistance rules require nursing home residents to "apply their available income toward the cost of their care." §HFS 103.07(1)(d), Wis. Adm. Code. The petitioner applied for institutional medical assistance in September 2001 and was granted benefits retroactive to August. Both Wisconsin and federal medical assistance laws contain provisions that grant an allowance from an institutionalized person to his spouse so that the spouse does not fall into poverty. See §49.455, Wis. Stats., and 42 U.S.C. §13964-5. The allowance is the amount that is necessary to bring the spouse's income to the lesser of \$2,175 or \$1,935 plus an excess shelter allowance, which is any shelter cost over \$580.50. *MA Handbook*, Appendix, §23.6.0.

The petitioner's wife has shelter costs that are less than \$580.50 so she is entitled to an allocation from her husband's income if she earns less than \$1,935. Each month the petitioner receives \$765 in unearned income. He was not required to pay any of this toward his patient liability in August because he was only in the nursing home part of the month. In September all of his income went toward his patient liability

because his wife earned more than \$1,935. In October and November a portion of his income went toward his patient liability and a portion went toward his wife's allocation because she earned less than \$1,935 in those months.

A spousal allocation can be increased at a fair hearing if the allowance fails to meet the spouse's needs. The petitioner's spouse requests such an increase. Because any additional amount given to the community spouse is a taxpayer-financed subsidy in the form of medical assistance, the law restricts the hearing officer's ability to raise the limit. Wisconsin law provides the following test for the exception:

If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse's monthly income allowance under sub. (4)(b).

§49.455(8)(c), Stats. Thus a hearing officer may increase the maximum allocation ceiling only by amounts needed to allow the community spouse to avoid financial duress and to meet necessary and basic needs. This means that certain expenses that are for desirable things are rejected. For example, the Division of Hearings and Appeals has long and consistently denied donations, including those to a church. See, e.g., MRA-45/#22021 MRA-32/22456 MRA-05/37611 MRA-13/45972 MRA-14/22543.

The petitioner's spouse submitted a budget that is summarized in Findings of Fact 6 and 7. These expenses differ somewhat from those listed for the petitioner in the budget his wife submitted. I have attributed to her automobile costs that are listed as his because there is only one car and only the wife drives it. In addition, I have attributed cable television costs to the petitioner because it is for a television in his room at the nursing home. Finding of Fact 6 consists of \$95.10 in expenses incurred by the petitioner each month. Wisconsin law specifically allows institutionalized persons to retain only \$45.00 for their personal needs. §49.45(7)(a), Stats. Therefore, I cannot allow any expenses for the petitioner above that amount.

Finding of Fact 7 consists of the items attributed to the petitioner's wife. Her monthly budget is \$2,570.92. In addition, she is responsible for \$199.95 in unpaid medical bills incurred before her husband received medical assistance. The two biggest expenses relate to her automobile. She pays \$729.04 per month for a 1999 Ford Windstar Van and another \$581 for automobile expenses. Normally I would find that this van exceeds what is necessary for her basic and necessary needs. However, she purchased the van with accessories for her husband's handicaps after he returned home from an earlier stay in the nursing because she did not expect him to have to return to the nursing home. Now, although he probably will have to remain in the nursing home, she remains responsible for the payments. She apparently has little equity in it so selling it will not reduce her liability. Under these circumstances I find that the Windstar payment is necessary to meet her basic needs.

But I do not find that she has proved that she requires \$581 for vehicle maintenance. A three-year-old vehicle should require little maintenance other than changing the oil, which should not cost more than \$30 every two or three months. Gasoline is only about \$1.25 per gallon, so even if one assumes that she spends \$81 a month for other vehicle expenses, she would have \$500 available, which would pay for 400 gallons of gasoline. The United State Environmental Protection Agency states that the 1999 Windstar gets 17 miles a gallon in the city and 23 miles a gallon on the highway. <http://www.fueleconomy.gov/feg/noframes/Ford1999.shtml>. If her driving was evenly divided between the city and highway, she could go about 8,000 miles on those 400 gallons of gasoline. Until she offers a better explanation I find that \$125 is sufficient for the van's maintenance and gasoline, as well as her insurance costs.

I also believe that the petitioner's spouse could lower her \$100 expense for incidentals, her \$100 for her telephone bill and \$400 for her food and supplies. However, these amounts are offset by unpaid medical bills that are not included in her monthly budget, so I will allow her full request for these items.

With the reduction of the automobile expense allowance, the petitioner's wife has shown that she requires \$2,116.92 to live on each month. Because the ultimate question is how much the petitioner must contribute toward his own care, his wife's income is also relevant. Her income has been unstable. She has a business from which she earned \$2,180.40 in September 2001 and \$1,702.40 in October and November 2001. She testified that this income fell when she recently lost a client, but she could not state exactly what her current income is.

Income is determined by using the best information available to obtain the best estimate of the recipient's prospective income. *BWI Operations Memo*, 97-113, October 31, 1997, p.3. Because the petitioner's spouse did not submit adequate information for me to determine her income, I will remand this matter to the county agency to determine her income and the petitioner's resulting share of his costs. There is no dispute about her income from September 2001 through November 2001, so the amounts that the county set for those months shall stand. The county agency should use her actual income for December and January to determine what her needs were for those particular months. The petitioner testified that the sinking economy has hurt her business, so her 2001 tax return may not accurately reflect her current income. But because she has a business whose nature is that it produces constantly shifting income, it also is not possible to determine her future income by looking only at her most recent month. Therefore, the county agency must take a middle course and use her income from October 2001 through January 2002 to determine her future income. If she does not supply recent income information then the county should use her average monthly income from all of the months it now has available.

CONCLUSIONS OF LAW

1. The petitioner's spouse requires \$2,116.92 to meet her minimum needs each month.
2. The petitioner is entitled to an allocation from her husband's income to bring her income up to the level of her minimum monthly needs.

NOW, THEREFORE, it is

ORDERED

That this matter be remanded to the county agency with the following instructions:

1. Within 10 days of the date of this decision it shall increase the income allocation to the petitioner's wife so that the allocation together with her income is \$2,116.92. This increase shall be retroactive to September 1, 2001.
2. Within 10 days of the date of this decision, the petitioner's spouse shall submit sufficient documentation to allow the county agency to determine her income for December 2001 and January 2001.
3. Within 10 days of receipt of the information from the petitioner's spouse the county agency shall determine the petitioner's cost share for period of September 2001 forward. In doing so it shall allow \$45 for his needs and \$2,116.92 for his wife's needs each month. It shall use \$2,180 for the petitioner's wife's income for September 2001 and \$1,702 for October and November 2001. It shall use her actual income for December 2001 and January 2002. Her future income shall be determined by averaging the months of October 2001 through January 2002.
4. If the petitioner's wife fails to provide evidence of her income through January 2002, the county agency shall use her average income derived from all months it currently has available to determine monthly income from December 2001 forward.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Eau
Claire, Wisconsin, this _____ day of
_____, 2002.

Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
315/MDO